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IN THE

Supreme Court of The United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the respondent municipalities "take" or otherwise unconstitutionally impair property rights in violation of the Fourteenth Amendment where

(a) the respondents induced purchasers of Washington Public Power Supply System bonds to loan funds to their public agency by expressly promising that they would repay the loan and repeatedly assuring the bondholders that they had the authority to make those commitments;

(b) the respondents presided over the irretrievable expenditure of the bondholders' loan on projects undertaken for the benefit of the respondents and their constituents;

(c) the respondents then repudiated their authority, abrogated their assurances, and refused to return any portion of the bondholders' funds after the projects failed; and

(d) the Supreme Court of Washington, in subsequently approving the actions of the respondents, redefined state law remedies and property rights in an arbitrary manner to approve the complete forfeiture of the bondholders' funds?

2. Did the Supreme Court of Washington deny due process under the Fourteenth Amendment by

(a) ruling for the first time that the authority of the municipalities turned on whether they exercised "sufficient control" over the management of the projects, treating this issue as a factual question, and then making its own findings of fact without affording any opportunity to present evidence on the issue;

(b) ruling that petitioners were not entitled to equitable relief because they had not proved "with clear, cogent and convincing evidence" they were entitled to it,

while refusing to grant a hearing at which petitioners might discharge that burden;

(c) refusing to grant any relief on the ground that the bondholders should have sought the remedy of a prior declaratory judgment, although the bondholders had no notice of any need to seek such a remedy and such a remedy would, in any event, not have been available to them; and

(d) refusing petitioner Chemical Bank's request to address whether any of the Justices of that Court should disqualify himself or herself on the ground that he or she had an appearance of a conflict of interest?

PARTIES TO THE PROCEEDINGS

Chemical Bank and the Washington Public Power Supply System were appellants below.

Respondents below were:

Public Utility District No. 1 of Benton County, Washington; Central Lincoln People's Utility District, Oregon; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Clatskanie People's Utility District, Oregon; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Pend Oreille County, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 10, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Ellensburg, Washington; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town

of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port Angeles, Washington; City of Richland, Washington; City of Rupert, Idaho; City of Springfield, Oregon; City of Steilacoom, Washington; City of Sumas, Washington; City of Tacoma, Washington; Alder Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachly-Lane Electric Cooperative Association, Oregon; Central Electric Cooperative, Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Oregon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company, Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Valley Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights, Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington; Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Pavelli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salem River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington;

Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; and West Electric Cooperative, Inc., Oregon.

A list of the subsidiaries (other than wholly owned subsidiaries) and affiliates of Chemical Bank called for by Rule 28.1 is in Appendix K.* The Washington Public Power Supply System has no affiliates.

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* This and similar references are to the separately printed Appendix to this petition, containing Appendices A through K.

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PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners Chemical Bank and the Washington Public Power Supply System respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered on December 17, 1984.

OPINIONS BELOW

The decision of the Supreme Court of Washington of which review is sought was issued November 6, 1984, is reported at 102 Wash. 2d 874 (1984), and is printed as Appendix A. The proceedings below prior to that opinion were as follows:

In an oral decision of October 15, 1982, incorporated into an unreported Order on Motions for Summary Judgment of November 16, 1982, printed as Appendix E, the Superior Court of Washington for King County granted the petitioners' motions for partial summary judgment. In an interlocutory decision filed on June 15, 1983, reported at 99 Wash. 2d 722, 666 P.2d 329 (1983), and printed as Appendix B, the Supreme Court of Washington reversed the order of the Superior Court. The Supreme Court of Washington denied petitioners' motions for reconsideration on July 22, 1983.

In an oral decision of August 9, 1983, incorporated into an unreported Order and Judgment of August 11, 1983, printed as Appendix D, the Superior Court of Washington for King County then granted respondents' motions for summary judgment or entry of judgment and dismissed petitioners' action in its entirety. In an oral decision of August 29, 1983, incorporated into an unreported Order Denying Motion For Reconsideration of Order and Judgment of September 16, 1983, printed as Appendix C, the Superior Court denied petitioners' motion for reconsideration. The November 6, 1984, decision of the Supreme Court of Washington referred to above, which affirmed the judgment of the Superior Court following petitioners' appeal, is sought to be reviewed here.

JURISDICTION

The opinion of the Supreme Court of Washington was filed on November 6, 1984. The mandate of the Supreme Court of Washington, printed as Appendix F, issued on December 17, 1984, following the denial on that date of a motion for reconsideration of a motion to intervene made by six bondholders. This Court has jurisdiction to review the judgment of the Supreme Court of Washington by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions, the texts of which are annexed to this petition in Appendix J:

—U.S. Const. art. I, § 10, cl. 1
—U.S. Const. amend. V
—U.S. Const. amend. XIV, § 1

STATEMENT OF THE CASE

Introduction

This case arises out of the largest municipal bond default in history—the default of the Washington Public Power Supply System (the "Supply System") on bonds in the principal amount of $2.25 billion and an additional $5 billion in interest. The Supply System issued the bonds at the direction, and for the benefit, of 88 municipalities, public utility districts, and rural electric cooperatives in six Northwestern states (the "participants" and respondents here), for the purpose of financing the last two of five nuclear power projects (known as Projects 4 and 5).

To persuade private parties to purchase the bonds, the participants expressly assured repayment and repeatedly told prospective purchasers that they possessed authority to give such assurances. Specifically, for each of the 14 issues of these bonds over more than four years, participants approved the necessary Supply System bond resolutions, and took no exception to the language in the Official Statements accompanying the bond offerings advising prospective purchasers that the participants were obligated to make repayment "whether or not the Projects are completed, operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output". Without those assurances, no bonds would have been sold.

The participants then supervised the irretrievable expenditure of the bondholders' funds for public purposes. However, when the projects failed, the participants repudiated their

promises, denying any obligation to return any portion of the bondholders' funds. Because the Supply System was merely the participants' instrumentality, lacking substantial assets of its own, the participants' repudiation of their obligations required the Supply System to default on the bonds.

In a decision so surprising and so unprecedented that the three dissenting Justices urged this Court to review it, the Supreme Court of Washington held that the Washington municipal participants had lacked the authority to make the unconditional commitments on which they had invited private parties to rely. The Court below relieved all of the remaining participants of any obligation and also denied every equitable or Constitutional claim made by the bondholders. The Court below thereby upheld the participants' efforts to impose the entire cost of their public projects on the bondholders. This shifted the business risk for these local public ventures from the participants, who had agreed to assume it, to mostly non-resident, private bondholders, who had been explicitly assured that they would never have to bear that risk. To reach that result, the Court below denied procedural due process by, for example, faulting the bondholders for not having previously sought a declaratory judgment remedy which had never been available, and, in a sudden, unjustified and unpredictable departure from all precedent, the Court retroactively manipulated state law so as to deny the bondholders any present remedy. As trustee for the bondholders, petitioner Chemical Bank ("Chemical"), together with petitioner Supply System, seeks review of that decision in this Court.

Background

The events preceding and precipitating the default may briefly be summarized as follows:

In the early 1970's, public utility planners in the Pacific Northwest forecast a need during the ensuing decade and beyond for substantially more electric generating capacity than had previously been built or planned. Public utilities in that

region sought to avert this power shortfall by joining in a common venture to construct five nuclear power plants. To obtain the economies of scale and risk reduction available through joint endeavor, the public utilities acted through the Supply System, a "joint operating agency" created by Washington statute, Wash. Rev. Code ch. 43.52 (1983), for the sole purpose of serving the interests of its members and participants.

The Supply System consisted of 23 Washington municipalities. Twenty of those municipalities were participants in the projects at issue here. Those twenty controlled 87% of the voting power on the Board of Directors which, throughout the sales of the bonds, was charged by Washington law with comprehensive management and control of the Supply System.[1] In addition, all of the participants in these projects were represented on a Participants' Committee, which had supervisory power over every significant action taken by the Supply System with respect to these projects, including the right to approve each bond resolution authorizing each of 14 project financings, each construction budget, and every significant contract and contract amendment.

All five projects were to be financed by debt through the sale of bonds to the public. The bonds for Projects 1, 2 and 3 were supported by the Bonneville Power Administration

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[1] 1965 Wash. Laws ch. 8, § 43.52.370, *as amended by* 1977 Wash. Laws ch. 184, § 7 (Ex. Sess.). The final sale of bonds for Projects 4 and 5 occurred on April 2, 1981. On April 28, 1981, the Washington Legislature amended § 43.52.370, *see* 1981 Wash. Laws ch. 3, § 1 (1st Ex. Sess.), *effective* July 28, 1981, to vest most of the control of a "joint operating agency" developing nuclear power plants, such as the Supply System, in an "Executive Board" consisting of four outside directors and seven regular directors. 1981 Wash. Laws ch. 3, § 2 (1st Ex. Sess.), *codified as amended at* Wash. Rev. Code § 43.52.374 (1983 & West Supp. 1985). In 1982 the Legislature again amended the statutes governing management of "joint operating agencies" to provide, among other things, for six outside directors and only five regular directors on the "Executive Board". Wash. Rev. Code § 43.52.374(1)(a), (b) (1983 & West Supp. 1985).

("BPA") through a "net billing" arrangement.[2] When that financing method became impossible because of a change in the law, payment of the bonds for Projects 4 and 5 was assured by using a technique that is common in municipal bond financing. The participants pledged—by means of "dry hole" or "take or pay" clauses in agreements between the participants and the Supply System (the "Participants' Agreements")—that they would make payments sufficient to service the bonds issued by the Supply System whether or not Projects 4 and 5 were ever completed or produced any electricity.[3] The participants' pledge was essential to any effort to market the bonds because it was the only source of assurance that the bondholders would be repaid in the event that the projects were to fail--an eventuality the participants could control, while the bondholders could not.

The need for the "dry hole" provisions arose from the participants' desire to avoid using any of their own funds to finance the projects, while reserving for themselves all of the potential benefits of the projects' expected success. Because the bondholders would not share in any "up side" potential of the projects, they did not contract to take the traditional "down side" risks of loss associated with equity or stock interests. Instead, the bondholders contracted for assurances of repayment and fixed rates of interest common to debt financings. The bondholders relied crucially on repeated and solemn assurances that the participants had the intent and authority to repay the debt of the Supply System, no matter what. Those assurances were written, unconditional, and backed by opinions

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[2] The "net billing" arrangement is described in *City of Springfield v. Washington Public Power Supply System*, 564 F. Supp. 90, 95 (D. Or. 1983), *aff'd*, Nos. 83-3927 & 83-4024 (9th Cir. Feb. 4, 1985).

[3] Such "dry hole" commitments have become a standard part of large power plant financing. Witten & Hecht, *Whoops, There Goes Washington: Is California Next?*, 15 Pac. L.J. 955, 957 n.13 (1984).

of each participant's counsel and independent bond counsel of national repute.

The bondholders were, of course, subject to the risk that the participants might become insolvent—a risk inherent in all debt securities. But the bondholders did not agree to take the risk that the participants might simply refuse to make the payments securing the bonds and that unforeseeable interpretations of state law would convert their loan into a gift.

On the strength of the participants' commitments and assurances, the bonds for Projects 4 and 5 were sold in 14 issues beginning in March 1977 and ending in April 1981, with each series of the bonds highly rated by Moody's (A-1) and Standard & Poor's (A+). But by mid-1981 serious problems had surfaced. The projected energy demand had not materialized, and there were substantial cost overruns on all five projects. All five Supply System projects, but particularly Projects 4 and 5, became a matter of intense public interest and controversy in the Northwest.

Still, the participants retained control over the destiny of Projects 4 and 5: on two occasions in 1981 the participants refused to approve plans which could have provided financing for continued construction of Projects 4 and 5, or, failing that, to ensure their orderly mothballing. Just as the participants' approvals of prior bond issues had carried the projects to that point, their disapprovals of project financing plans in 1981 spelled the projects' certain demise.

Deprived of any means of continued financing of Projects 4 and 5, the Supply System determined that it could not continue their construction. On January 22, 1982, the Supply System Board of Directors terminated those projects pursuant to the provisions of the Participants' Agreements. Under the terms of these Agreements, the participants were obligated to fund the payment of the principal and interest on the bonds.

Before the Supply System encountered serious financing difficulties, no participant had publicly questioned any participant's authority to make the required payments to retire the debt incurred on its behalf. Nor had any of the participants' ratepayers sought to contest the validity of the agreements that had enabled the participants to join in the projects for the ratepayers' benefit without advancing public funds. When it became clear that Projects 4 and 5 would fail, however, many participants abruptly reversed their prior position. They claimed that they had never possessed authority to execute the agreements on which they had induced prospective bond purchasers to rely.

The participants did not then and do not now claim to be unable to satisfy their obligation to the bondholders. They are not financially insolvent and do not claim that satisfaction of their obligation would make them insolvent. Rather, they simply declined to honor their unconditional commitments and refused to return any portion of the bondholders' funds.[4]

According to estimates prepared by or available to Chemical, there are approximately 45,000 bondholders.[5] Many more bonds were sold to individuals than to institutions: approxi-

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[4] At the time the participants were obligated to begin debt service payments under their agreements, the average cost per kilowatt-hour to them as a result of the payments was estimated by the BPA to be one-half cent, which would have been added to their estimated average retail cost of electricity of about 2.6 cents per kilowatt-hour. Based on that study, therefore, if the participants honored their obligations fully their ratepayers' average cost of electricity would have been approximately one-half the national average of about six to seven cents per kilowatt-hour and would also have been below the average rate paid by customers of investor-owned utilities in the Pacific Northwest. Lane, *No WPPSS Default—Yet*, Seattle Times, Jan. 23, 1983, at D-2; *see also* U.S. Bureau of the Census, *Statistical Abstract of the United States* (1984 ed.), at 500 (national average rate).

[5] Because the bonds are bearer bonds and the vast majority are unregistered, precise information concerning the number of bondholders, their identity, the amount of their holdings, and the like, is unavailable, necessitating the use of estimates.

mately two-thirds of the $2.25 billion principal amount of the bonds was purchased by individuals, frequently for the retirement income they were expected to provide. The bonds were issued in units of $5,000; the average holding by families or individuals has been estimated to be $15,000.

Proceedings Below and the Federal Questions Presented

In May 1982, certain participants filed a declaratory judgment action in the Superior Court of Washington for Lewis County asking the Court to invalidate their obligations under the Participants' Agreements. Plaintiff participants named the Supply System and other participants as defendants, but pointedly invited defendant participants to join them as plaintiffs in seeking to avoid payment for the now-terminated projects. Before this could occur, Chemical, as trustee for the bondholders, initiated its own declaratory judgment action in the Superior Court of Washington for King County. After venue of the Lewis County Action was moved to King County, the Lewis County action was dismissed in favor of the Chemical action.

Chemical sought a declaration that the participants remained liable to honor their "dry hole" commitments. The trial court granted Chemical's and the Supply System's motions for summary judgment, holding that the Washington participants did have authority to make these commitments in order to provide electrical power to their constituents. *Chemical Bank v. Washington Public Power Supply System,* No. 82-2-06840-3, slip op. at 3-4 (Super. Ct. King County Nov. 16, 1982) Order On Motions For Summary Judgment (Appendix E, at 3). The issue of the participants' authority to enter into their "dry hole" commitments was then presented to the Washington Supreme Court by the participants on interlocutory appeal, with a few of the participants and the Supply System supporting Chemical.

On June 15, 1983, the Washington Supreme Court sent a shock wave through the municipal bond market by reversing the trial court. The Supreme Court held that the 28 Washington municipalities (representing 68% of the participants' obliga-

tions) had acted *ultra vires* seven years earlier in entering into the Participants' Agreements. This decision was reached despite Washington statutes expressly granting municipalities broad discretionary authority to purchase electricity, to construct or acquire power plants, and to enter into joint arrangements, and despite a statutory mandate and prior decisions by that Court that such municipal authorizations should be liberally construed. Now, according to the Court, while the participants had ample authority to assume for themselves the "dry hole risks" inherent in such undertakings, they could not do so jointly under the Participants' Agreements unless they met an additional and newly announced test: that they had exercised "sufficient control" over the projects. *Chemical Bank v. Washington Public Power Supply System,* 99 Wash. 2d 722, 666 P.2d 329 (1983) (hereinafter cited as *Chemical Bank I*) (Appendix B). Although the Court was reviewing the trial court's decision granting summary judgment, and although the trial court had reached its decision without articulating (or passing upon) any issue of participants' "control", the Washington Supreme Court for the first time in this case set forth the "control" issue, treated it as a factual one, and made its own findings of fact that the requisite control had been absent—all without affording any opportunity to present evidence on this newly announced legal standard.

Because the Washington Supreme Court's June 1983 *ultra vires* opinion was issued on interlocutory appeal and concerned only the authority of the 28 Washington municipal participants, the case was remanded to the Superior Court. There Chemical and the Supply System raised numerous legal and equitable claims for relief under state law independent of the *ultra vires* decision. Finally, Chemical and the Supply System urged that, if state law were to be construed to deny any remedy, then the actions of the participants, as otherwise judicially approved, constituted a taking without just compensation, impaired the bondholders' rights, and deprived the bondholders of their property without due process of law contrary to the Federal and state Constitutions.

Without hearing any evidence, the trial court rejected every argument and granted motions for summary judgment or entry of judgment in behalf of all participants. It excused the remaining 60 participants from all obligations under their agreements in light of the Supreme Court's decision excusing the 28 Washington municipal participants. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip op. at 2-3 (Super. Ct. King County, Aug. 11, 1983) Order and Judgment (Appendix D, at 2-3); *see also Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip op. at 2 (Super. Ct. King County, Sept. 16, 1983) Order Denying Motion For Reconsideration of Order and Judgment (Appendix C, at 2).

On the appeal from that judgment, Chemical and the Supply System again raised, among other grounds for reversal, Federal constitutional claims of taking without just compensation, impairment of property rights, and deprivation of property without due process. The Washington Supreme Court, however, three of the nine Justices dissenting, reaffirmed its prior *ultra vires* holding and upheld the trial court's rejection of all of petitioners' other claims. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874 (1984) (hereinafter cited as *Chemical Bank II*) (Appendix A). It determined that the participants' promises and assurances did not provide a basis for estoppel, 102 Wash. 2d at 905-09 (Appendix A at 31-36), that their expenditure of the bondholders' funds for public purposes did not provide any equitable basis for restitution, 102 Wash. 2d at 909-12 (Appendix A at 36-38), and that the resulting appropriation of the bondholders' property did not violate the Federal or state Constitutions, 102 Wash. 2d at 912-13 (Appendix A at 38-39). The Court declined to address the question raised by Chemical as to the appearance of partiality of any of its members who were ratepayers of any of the participants.

The three dissenting Justices condemned the result reached by the majority, and the process by which it reached that result, as flatly contrary to the "constitution, statutes and case law" of Washington and as violative of the Due Process and Takings Clauses of the Federal Constitution.

The dissenting Justices were sharply critical of the reaffirmance of the *ultra vires* holding:

> "The majority opinion throws into confusion a body of municipal law carefully developed over many years prior to this case which granted to municipalities broad authority in the exercise of their police powers. This power to manage their own affairs, subject to broad legislative guidance, has been carefully built into our constitution, statutes and case law. Our own recent cases, not mentioned by either majority opinion, confirm this." *Chemical Bank II*, 102 Wash. 2d at 915 (Appendix A at 42).

The majority opinion on lack of authority has also been criticized by all law review commentary pertaining to it.[6]

The dissent also pointed out that the majority made findings of fact on disputed evidence without any resolution of those factual issues in the trial court; indeed, without any trial of those issues. *Id.* at 920-21 (Appendix A at 47-48). The dissent disagreed with the denial of any remedy to the bondholders because the Supreme Court of the United States "continues to invoke the takings clause and the contracts clause to protect citizens from the transfer of private property to public purposes by governmental action", citing, *inter alia*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Chemical Bank II*, 102 Wash. 2d at 914 (Appendix A at 41).

The three dissenting Justices were so offended by the majority's cavalier treatment of fundamental rights to procedural due process, and by the confiscation of the bondholders'

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[6] Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273 (1984); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of Ultra Vires Doctrine*, 5 U. Puget Sound L. Rev. 59 (1984); Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 59 Wash. L. Rev. 653 (1984); Note, *Chemical Bank v. Washington Public Power Supply System:* The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations, 69 Cornell L. Rev. 1094 (1984); Witten & Hecht, *supra* note 3, at 974-75.

property, that they took the unusual step of urging review by this Court:

> "The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event they do, the United States Supreme Court should exercise its discretion and accept this case for review. Our court's action is similar to that taken by many state courts in the reconstruction era which were reversed on constitutional grounds by the United States Supreme Court." *Id.* (Appendix A at 40-41).

Related Litigation

The failure of Projects 4 and 5 generated substantial additional litigation. Participants situated in Idaho successfully sought a decision on the lack of their authority under the Idaho Constitution from the Idaho Supreme Court.[7] In sharp contrast, the Supreme Court of Oregon unanimously refused to apply hindsight to relieve the Oregon participants from their undertakings.[8] Considering state statutory provisions similar to Washington's, the Oregon Supreme Court concluded that the

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[7] *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I), *cert. denied*, 105 S. Ct. 219 (1984). After the Idaho Supreme Court decision, the Washington Superior Court relieved the Idaho participants from any liability. A similar decision was reached by a Wyoming district court with respect to participants located there, but that judgment was vacated as moot following the Washington Superior Court's 1983 decision absolving all participants from liability. *Pacific Power & Light Co. v. Public Service Commission*, 677 P.2d 799, 804 (Wyo.) (Appendix H), *cert. denied*, 105 S. Ct. 120 (1984). Both the Idaho and Wyoming participants were parties in the Washington proceeding and are respondents here.

[8] *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G). Those Oregon participants, however, have been relieved of liability to the bondholders by virtue of the Washington Supreme Court's holding releasing all non-Washington participants. *Chemical Bank II*, 102 Wash. 2d at 880, 896-99 (Appendix A at 5, 22-26). The Oregon participants are respondents here.

Oregon participants had the authority that the majority of the Washington Supreme Court decided was lacking.[9]

There are also pending actions in federal court brought by Chemical and others alleging securities fraud, negligence and other causes of action against the participants, the Supply System, BPA and others.

REASONS FOR GRANTING THE WRIT

The nation's largest municipal bond default is naturally a matter of considerable public interest. But this case is important not merely for its size. The actions of the 88 participants—inducing the purchase of $2.25 billion of bonds, overseeing the expenditure of that vast sum for public purposes, and then repudiating their obligations and disclaiming any responsibility for restitution or other relief when the projects failed—raise grave issues concerning the appropriation of private property for public use without compensation.

Those actions, and the unprecedented, unforeseeable and unjustifiable decision of the Washington Supreme Court imposing the entire loss on the bondholders and rejecting all

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[9] Justice Linde, writing for the Oregon Court, observed that the risk found by the Washington Supreme Court to be *ultra vires* was an inevitable feature of the activities in which municipalities had long engaged:

> "[The participants'] agreements proved unwise in retrospect, and with the benefit of hindsight they may appear to have been unwise when made. But that is no reason to find them unauthorized. When a city has authority to provide electric power or other public services, that authority cannot well be construed to permit wise but to exclude unwise contracts. A long-term commitment to pay the cost of a needed source of supply could prove to be a financial calamity in many imaginable situations. A city might contract to assure itself of a supply of oil in a period of shortages and high prices only to have the market price collapse in a subsequent oil glut. . . . A city college might enter a long-term lease in order to have an apartment building converted to a dormitory for which there turns out to be no student demand. A desert city in need of a water supply might contract with some other entity to cover the costs of drilling wells in search of such a supply irrespective how little water was found. In the first example the price is excessive, the

equitable relief, present substantial questions under the Takings and Due Process Clauses of the Constitution, embodied in the Fourteenth Amendment, which were decided below contrary to principles established by this Court.

1. The Takings Clause Question Is Substantial.

This case raises important questions concerning the basic relationship between (1) the Constitution's express prohibition of uncompensated takings of property and (2) the prerogative of the states to define the contours of particular property rights and remedies involving municipalities. It is the unique function of this Court to harmonize these two competing and legitimate principles. Only this Court can determine whether states or municipalities—with the approval of state courts—may avoid the financial consequences of their unsuccessful projects and impose them on private parties or whether the Fourteenth Amendment will stand to prevent such action.

As this Court has repeatedly said, the Takings Clause (U.S. Const. amend. V, cl. 4), made applicable to the states by the Due Process Clause (U.S. Const. amend. XIV, § 1, cl. 3), embodies basic concepts of "justice and fairness". While there is no set formula for determining when "justice and fairness" require compensation, "the Court's decisions have identified several factors that have particular significance" in resolving what are "essentially ad hoc, factual inquiries". *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Among the most important factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations". *Prune Yard Shopping Center v. Robbins,* 447 U.S. 74, 83 (1980).

(a) *Analysis of the Relevant Factors Demonstrates That a Taking Occurred.*

Analysis of each of these relevant factors demonstrates that a taking occurred, and that the bondholders were deprived of

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second acquisition proves superfluous, and the third may produce nothing in return for the money, but with respect to the issue of the cities' authority they are the same in principle. What distinguishes the present case is only the magnitude of the sums involved." 296 Or. at 584, 679 P.2d at 1338-39 (Appendix G at 39).

their rights, when the participants used the bondholders' funds for their projects, and then, with the Washington Supreme Court's approval, repudiated any obligation to repay any of those funds.

(i) There can be little doubt that the participants' actions interfered with bondholders' "reasonable investment-backed expectations". The participants created those expectations in the first place; the participants' payment promises were the projects' security. *E.g., Kaiser Aetna v. United States,* 444 U.S. 164, 179 (1979). While the projects were being financed and constructed, the participants gave repeated assurances of their authority when they approved each of the bond issues. Yet they repudiated those same assurances when the projects were abandoned after the bondholders' money was spent. The "reasonableness" of the bondholders' "investment-backed expectations" is confirmed by their good faith reliance on those assurances throughout. No one has ever suggested that the bondholders in any way acted in bad faith. The result, however, has been a complete divestiture of the bondholders' entire stake.

(ii) The extent of the "economic impact" of the participants' actions also demonstrates that a taking occurred. The impact was total. The bondholders have lost not only the benefit of their bargain, but their entire $2.25 billion principal amount as well.

(iii) Another pertinent factor is the "character of the governmental action"—whether it is a "public program adjusting the benefits and burdens of economic life to promote the common good", *Penn Central,* 438 U.S. at 124, or an effort to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980). The "character of the governmental action" is particularly offensive here, because these were projects undertaken by and for the governmental participants for the benefit of their public constituencies. However, by virtue of the participants'

belated repudiation of their obligations, and the unjustified refusal of the Court below to grant any relief, the bondholders alone are being required to bear the entire cost of these public projects.

(b) *The Result Here Conflicts with Webb's Fabulous Pharmacies.*

That an unconstitutional forfeiture has been exacted here is further illustrated by the conflict between the result reached in the Court below and this Court's decision in *Webb's.* There this Court held that state courts "by *ipse dixit,* may not transform private property into public property without compensation". *Webb's,* 449 U.S. at 164. Similarly, as Justice Stewart wrote, concurring in *Hughes v. Washington,* a case involving an alleged unlawful taking by the state:

> "We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest v. City Bank Co.*, 321 U.S. 36 (1944). Cf. *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938)." 389 U.S. 290, 296-97 (1967).

As in *Webb's* and *Hughes,* the decision by the Court below in this case demonstrates that a redefinition of state property rights and remedies "by *ipse dixit*" and "sudden change in state law" occurred in order to attempt to sanction the taking effected by the participants. In addition to the harsh and unpredictable ruling that the Participants' Agreements were

ultra vires, the Washington Supreme Court engaged in other retroactive manipulations of state law to "transform private property into public property without compensation" without the benefit of any "public program" justification. *Penn Central,* 438 U.S. at 124. For example:

(i) *The Purported Availability of an Earlier Declaratory Judgment Remedy.* The Court below decided that the bondholders' reliance interests must be sacrificed here because the bondholders were guilty of "neglect" in not obtaining, before any bonds were sold, a declaratory judgment as to the participants' authority to assume the "dry hole risk". *Chemical Bank II,* 102 Wash. 2d at 906 (Appendix A at 32); *see also id.* at 899, 905 (Appendix A at 25-26, 32). As with its rule on participants' "control", the Court below created this rule of decision *sua sponte;* it had not been factually developed, briefed, or argued, and the Court cited no authority for it.

By contrast to *Webb's,* where the claimants had clear, specific prior notice of the adverse claim against their funds and still prevailed, the bondholders here had no hint they should do something to protect their money before buying a bond. As even the majority below recognized, "all parties assumed that statutory authority existed". *Chemical Bank II,* 102 Wash. 2d at 899 (Appendix A at 25).[10]

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[10] Of course they did—and that assumption was hardly limited to the parties. The United States Nuclear Regulatory Commission reached the same conclusion when assessing the adequacy of the projects' financial backing. Observing that "the participants are obligated to make payments whether or not the project is completed, operable or operating," and that "[t]his method of financing large electric generating projects has been successfully utilized by WPPSS for several years," the Commission determined that the projects possessed the financial security required to allow issuance of a construction permit. 7 NRC 254, 257-58 (1978); *see also* 7 NRC 599, 629-31 (1978).

Indeed, as recently as January 1981, the Energy and Utilities Committee of the Washington State Senate described the participants' unconditional commitments as "secure financial arrangements" which "are characterized by the financial community as 'hell or high water'

Thus, this new state law doctrine, which was created by the Court below to deny the bondholders any remedy, cannot be justified on grounds of "neglect" or otherwise. That this new rule is wholly an aberrant creature of this case is further demonstrated by the illusory nature of the remedy the Court below held the bondholders should have sought. Quite simply, the declaratory judgment procedure invoked by the Court below to deny the bondholders' right to equitable relief has never existed under Washington law.[11]

(ii) *The Denial of Restitution.* Both in *Webb's* and in this case, money was loaned to a public body on promise of being returned. In *Webb's*, the county had repaid the principal; it was the confiscated interest that this Court ordered returned. Here, the public seeks to keep the benefit of both principal and interest, and the Court below, again invoking the *ultra vires* doctrine, has barred restitution of anything, principal or interest, to the bondholders. The Court offered two reasons for denying the bondholders restitution, but, again, neither of them passes constitutional muster:

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clauses because they are obligations for repayment in all events. 'Hell or High Water' arrangements rely on the participants' ability to sell electricity at whatever price from sources other than the plants under construction to pay for their share of the construction of those facilities whether or not any or all of them are ever completed or operating." Energy and Utilities Comm., Washington State Senate, WPPSS Inquiry: Causes of Cost Overruns and Schedule Delays on the Five Nuclear Power Plants, at 53 (Jan. 12, 1981).

[11] A party may not obtain a binding declaratory judgment in Washington unless there is a genuine adverse interest between the parties which creates a case or controversy. *See, e.g., Clallam County v. Board of Clallam County Commissioners,* 92 Wash. 2d 844, 848, 601 P.2d 943, 945 (1979). There was no such case or controversy here when the bonds were issued because both the participants and the bondholders were taking the same position that the participants' obligations were valid. *Chemical Bank II*, 102 Wash. 2d at 899 (Appendix A at 25). There is a Washington statute allowing special declaratory judgment actions to test the validity of municipal bond obligations, Wash. Rev. Code §§ 7.25.010-.040, but by the terms of the statute it cannot be invoked by bondholders or prospective bondholders. Wash. Rev. Code § 7.25.020.

First, the Court denied restitution from the participants because, it held, the benefit of the bondholders' loan had been conferred, not on the participants, but on the Supply System, which used the loan "for its purposes". *Chemical Bank II,* 102 Wash. 2d at 911 (Appendix A at 38). But the Supply System did not have any "purposes" of its own. The Supply System procured and spent the bondholders' money at the participants' behest for only one purpose—to enable the participants to obtain electrical power at cost.[12] For five years the participants had the use of the bondholders' money to pursue that objective through the joint operating agency. Thus, the dissent correctly observed:

> "[I]t was for the participants' benefit that the plants were being built in the first place. . . . [T]he real interested parties to this transaction were the participants. To them, the benefits flowed and, from them, restitution is therefore proper. . . . [J]ustice requires some relief to the bondholders." *Chemical Bank II,* 102 Wash. 2d at 936 (Appendix A at 62).

Second, the Court below upheld the refusal of the 28 Washington municipal participants to make restitution on the additional ground that their agreements were "substantively ultra vires". *Id.* at 911, 912 (Appendix A at 38). Prior Washington law had taught that municipal action could be found substantively *ultra vires,* and restitution denied, only "[w]here authority is so completely lacking [that] it seems fair to presume bad faith on the part of the private party". *Noel v. Cole,* 98 Wash. 2d 375, 381 n.3, 655 P.2d 245, 250 n.3 (1982).[13] There is no dispute here, however, that the bond-

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[12] Indeed, the participants themselves have maintained in this litigation that the Supply System "played the role of a financing conduit for the participants". Columbia Petitioners' Brief at 58, *Chemical Bank I* (Jan. 21, 1983).

[13] Here, the Court below itself acknowledged that such authority was not "so completely lacking" since, as the Court recognized, "all parties assumed that statutory authority existed" (*Chemical Bank II,* 102 Wash. 2d at 899 (Appendix A at 25)), and bond counsel had so opined. Also, by the Court's own reckoning, the participants had

holders loaned their money in absolute good faith, in reliance on the representations of the participants, their counsel, and independent bond counsel, all without an inkling that the participants lacked authority to enter into the Participants' Agreements.

At bottom, the only "justification" for the Court's harsh, retroactive result was the one forbidden by this Court in *Webb's:* to uphold an "exaction [of] a forced contribution" to municipal revenue. 449 U.S. at 163.[14] If the bondholders can

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authority to purchase electric energy, to acquire or construct electric generating facilities individually or through joint development (and bear the associated "dry hole" risk), and to enter into joint operating agency agreements to secure energy supplies. *Chemical Bank I*, 99 Wash. 2d at 782-97, 666 P.2d at 334-42 (Appendix B at 10-24).

[14] The holding of the Court below that the remaining 60 participants were excused from their contractual obligations because the 28 Washington municipal participants had been excused reflects a similar attempt to manipulate state law to assure that the confiscation of the bondholders' stake would be complete. The Court excused the remaining participants on the ground that release of the Washington municipal participants frustrated the purpose of the Participants' Agreements. *Chemical Bank II*, 102 Wash. 2d at 897-98 (Appendix A at 23-24). But the authority cited by the Court for its ruling makes clear that an event that might otherwise excuse performance on grounds of frustration of purpose does not do so where "a contrary intention" appears in the agreement. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558, 562, 637 P.2d 647, 650 (1981). Section 6(d) of the Participants' Agreements establishes that such a "contrary intention" existed here. It provides that each participant would fund its fixed share of the debt service *whether or not* other participants performed their obligations under the agreements.

The Court also excused the remaining participants on the additional ground that a mutual mistake had been made regarding the authority of the 28 Washington municipal participants. *Chemical Bank II*, 102 Wash. 2d at 898-99 (Appendix A at 24-26). However, it is well established that the doctrine of mutual mistake excuses performance only if the party seeking relief was "adversely affected" by its mistake. *E.g., Restatement (Second) of Contracts* § 152 (1981). Since under Section 6(d) of the agreements the liability of the remaining participants was the same regardless of whether the 28

be denied any relief by an unforeseeable and unjustifiable interpretation of state law of the type created by the Washington Supreme Court, the protections of the Fourteenth Amendment will have been seriously eroded.

As the dissent forcefully states at length, there is simply no principled basis for the majority decision below. It disregards relevant Washington statutory and case law in an effort to protect citizens of Washington at the expense of the bondholders. If the same action had been taken by the Washington Legislature, that would have violated the Contract Clause (art. I § 10, cl. 1) of the Federal Constitution.[15] As recent cases have suggested, the Takings Clause, the Contract Clause and the Due Process Clause rest on the same underlying principles. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 14-15 (1977); Note, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments").

While court decisions generally do not violate the Contract Clause (*see Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924)), what happened here—the denial of all relief by a majority bent on that result—offends the Fourteenth Amendment and its guarantee against deprivation of property without due process of law. When states act to impair their own obligations, this

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Washington municipal participants performed their obligations, the remaining participants were not adversely affected by any mistaken assumptions about the authority of the Washington participants.

[15] The forfeiture upheld below is a far more drastic impairment than the initiative adopted by the voters of Washington in 1981 curtailing the authority of the Supply System which was held to violate the Contract Clause in *Continental Illinois National Bank and Trust Co. v. Washington*, 696 F.2d 692 (9th Cir.), *appeal dismissed*, 460 U.S. 1077 (1983).

Court has insisted upon strict scrutiny. *United States Trust Co. v. New Jersey*, 431 U.S. at 25-26. Such scrutiny is called for here where the participants, with the approval of the majority below, have acted, not just to impair the bond contract, but to take the bondholders' entire stake.

2. The Procedural Due Process Clause Questions Are Substantial.

Procedural due process requires notice, an opportunity to be heard, and an impartial tribunal. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (notice); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (opportunity to be heard); *In re Murchison*, 349 U.S. 133, 136 (1955) (impartial tribunal). The decision below denied the bondholders each of these essential elements of procedural due process.

(a) *The Bondholders Were Denied Notice and an Opportunity to be Heard on Critical Factual Issues.*

This case has proceeded through several state court hearings, but none of those hearings was evidentiary. Nonetheless, the Court below raised and resolved criticial issues of disputed fact in violation of the bondholders' procedural due process rights. The Fourteenth Amendment requires " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case, *Mullane v. Central Hanover Tr. Co., supra*, at 313.' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)).

In *Chemical Bank I*, the Washington Supreme Court invented a new and wholly unforeseeable "control" test for the authority of municipalities to contract for "dry hole risks" in power plant construction. 99 Wash. 2d at 787, 666 P.2d at 337 (Appendix B at 14). If the participants had "sufficient control", then they could jointly assume a "dry hole risk" even under the Washington Supreme Court's strained interpretations

of state law. *Id.* at 784-85, 666 P.2d at 336-37 (Appendix B at 14-18); *Chemical Bank II*, 102 Wash. 2d at 892-93 (Appendix A at 18-20).

Because this "sufficient control" test did not exist before *Chemical Bank I*, neither the bondholders nor the Supply System had prior notice or opportunity for a hearing on the issues involved. The Court below treated this new "control" test as a factual question which it should resolve and found the facts it wanted to support its conclusion. The Court below found that:

> "Considering the complexity of the various budgetary items, construction decisions and financing arrangements involved in a project of this scope, *it seems unlikely* that a part-time committee of representative participants could provide significant input to the management of the projects with such rigid procedural requirements". 99 Wash. 2d at 787, 666 P.2d at 337 (emphasis supplied) (Appendix B at 15).

The Court also found that "the participants' committee *apparently* served as a rubber stamp for WPPSS' decisions". *Id.* (emphasis supplied.)

The trial court on remand concluded that it could not reopen these findings, and neither the bondholders nor the Supply System ever had any opportunity to present evidence on this issue. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, transcript at 4-5 (Super. Ct. King County, Aug. 29, 1983) (Verbatim Report of Proceedings Before the Honorable Joseph Coleman) (Appendix C at 6). When the bondholders and the Supply System then asked the Washington Supreme Court to allow a hearing on the issue of "control", however, the Court responded that the "control" issue was actually "a question of law". *Chemical Bank II*, 102 Wash. 2d at 894 (Appendix A at 20). As previously noted, *see supra* at 12-13, the three dissenting Justices condemned this appellate fact finding as "contrary to all our previous case law" and asked for review by this Court. *Chemical Bank II*, 102

Wash. 2d at 914 (Appendix A at 40).[16] Even counsel for the Washington Public Utilities Group, which includes many of the participants and respondents here, has conceded in open court in the federal securities litigation involving the Supply System that the Washington Supreme Court, when it decided the "control" issue, decided a contested issue of fact.[17] And evidence recently taken in that same litigation—the deposition testimony of a leading representative of the participants on the Participants' Committee—directly controverts the appellate fact-finding undertaken by the Washington Supreme Court and thereby underscores the denial of due process which has occurred here.[18]

In sum, as the opinion in *Chemical Bank I* plainly reveals, the majority was engaged in fact finding when it considered matters such as the relative complexity of the projects and how the "apparent" "rubber stamp" function of the Participants' Committee bore directly on the issue of "control" and made "it seem unlikely" that sufficient "control" existed to satisfy the majority's new test of municipal authority. By the very terms used by the Court, those were factual matters.[19] The Court below improperly chose to notice and rely upon those contested factual matters,[20] while ignoring uncontested facts and related statutory provisions—for example, that the participants held

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[16] *See also Chemical Bank II*, 102 Wash. 2d at 920 (Appendix A at 47), *citing* Wash. Const. art. IV, § 6 (powers of trial courts); *Stringfellow v. Stringfellow*, 56 Wash. 2d 957, 959, 350 P.2d 1003, 1004 (1960) (resolution of factual disputes remains the exclusive province of the trial court).

[17] The relevant portion of the transcript in which this concession was made is attached as Attachment A to this petition.

[18] The pertinent excerpt of that testimony is attached as Attachment B to this petition.

[19] *See also Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145 (1939) (existence of control is "an issue of fact to be determined by the special circumstances of each case").

[20] Due process only permits judicial notice of facts that are "determinate" or "notorious". *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300-02 (1937); *see also United States v. Abilene & Southern Railway Co.*, 265 U.S. 274, 288-90 (1924). The facts noticed by the Washington Supreme Court in

voting control of 87% of the Supply System's Board of Directors, *Chemical Bank II*, 102 Wash. 2d at 922 (Appendix A at 49), which was statutorily charged with management and control of the Supply System (*supra* at 5 & n.1).

Control was not the only factual issue the Court decided without allowing presentation of evidence. The Court held that "to establish equitable estoppel, every particular must be proven by the plaintiff with clear, cogent and convincing evidence. . . . We believe that plaintiffs have not met this burden." *Id.* at 905 (Appendix A at 31).

The bondholders' equitable estoppel claim, however, was dismissed by the Court below as a matter of law. Because there was no trial below, the bondholders never had an opportunity to present evidence to meet *any* evidentiary burden, let alone the exacting burden of proof imposed by the Court. *See Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 169, 171 (1935) (state court violated due process by holding that "'[t]he burden . . . of overcoming this presumption . . . rests upon the plaintiffs in error'" and then denying them an opportunity to present evidence to rebut the presumption).

(b) *The Bondholders Had No Notice or Opportunity to Protect Their Rights.*

As discussed *supra* at 18-19, the Court below held that the bondholders should have obtained a declaratory judgment regarding the participants' authority to assume the "dry hole

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finding that no control existed do not rise to this level of common knowledge. "[T]o press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial". *Ohio Bell Telephone*, 301 U.S. at 302. *See also Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.). In *Saunders*, as in the present case, the state supreme court applied a new interpretation of the law, under which a factual question (the existence of "benefit") was controlling. Saunders had argued successfully in the trial court that "benefit" was immaterial and had prevailed without presenting evidence on that issue. The state supreme court reversed on rehearing, finding that there was no "benefit". This Court reversed, holding that Saunders had been denied his opportunity to be heard, contrary to the Fourteenth Amendment. 244 U.S. at 319.

risk"; however, the bondholders were given no notice that they were required to seek that remedy and, in fact, they could not have obtained a binding declaratory judgment because of the lack of the necessary controversy.

This retroactive invocation by the Court below of an unavailable remedy is itself a denial of due process. State courts cannot, consistent with the Fourteenth Amendment, deny relief on the ground that parties should have sought a different remedy at an earlier time when that remedy was not available; parties must be afforded a "real opportunity" to protect their rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 678-79, 682 (1930); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457 (1958). That was not afforded to the bondholders here.

(c) *The Bondholders Were Denied Their Right to an Impartial Tribunal.*

The Court below, composed of elected Justices,[21] failed even to address the question whether any of its members should be disqualified from hearing the appeal. Chemical had asked that any Justice of the Washington Supreme Court who was a ratepayer of one of the participants be disqualified on the ground that the Justice had at least the appearance of a conflict of interest.[22] Yet the Court declined even to respond to Chemical's request. It was simply ignored.[23]

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[21] Wash. Const. art. IV, § 3 (Justices of Washington Supreme Court re-elected every six years).

[22] Chemical did not know whether any Justices were ratepayers, but information supplied by the Clerk of the Washington Supreme Court indicated that two members of the Court which decided *Chemical Bank I* were residents of Washington communities served by respondents. One of those Justices was not a member of the *Chemical Bank II* Court; the other Justice wrote the majority opinion in *Chemical Bank II* and the respondent serving his community had a 10.7% share of Projects 4 and 5 (representing a debt service obligation of over $700 million). This Court has held that an indirect financial stake in the outcome of litigation is sufficient to disqualify decision-makers on constitutional grounds. *Gibson v. Berryhill,* 411 U.S. 564 (1973); *see also Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927).

[23] In striking contrast, every federal district judge in the Western District of Washington has disqualified himself or herself from

CONCLUSION

This case raises serious questions about municipal financing, public morality and trust in government. The thousands of bondholders, many of them individuals who invested their life savings, suffered a complete forfeiture of their funds while at the same time they were denied elemental due process rights by the Washington state courts. The promises made to secure the bondholders' loan have been repudiated, their money has been spent for public purposes, and they have been refused any remedy.

The inevitable result of the decision below will be to erode confidence in the institutions of government. The decision will encourage, if it does not require, government officials to raise claims of *ultra vires* to protect their constituents whenever a large public project fails. The pressures to protect the public against unwise decisions taken in its name—at the expense of politically powerless minorities—can be enormous, as this case shows. Those pressures should be resisted now, as they have been in the past.

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presiding over Supply System litigation. The result has been that federal securities litigation now pending in Seattle was assigned to a federal judge from Arizona. And, over the objection of the participants, that judge ruled that the securities case will not be tried in the Pacific Northwest because of the danger of jury bias. *In re Washington Public Power Supply System Securities Litigation,* M.D.L. No. 551 (W.D. Wash. Oct. 10, 1984) Order. On January 22, 1985, after that judge learned that his parents held Supply System bonds, he recused himself on his own motion and another judge from the District of Arizona has been designated.

This case thus raises substantial issues of national importance under the Fourteenth Amendment worthy of review by this Court, and this Petition for a Writ of Certiorari should be granted.

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Attachment A

Transcript of Oral Proceedings
Before the Hon. Richard M. Bilby
In re Washington Public Power Supply System Litigation
M.D.L. No. 551 (W.D. Wash. Dec. 2, 1983), Tr. 435-36

"MR. MALANCA [counsel for certain utilities]: Your Honor, the question, getting back to control for just a moment, and that's the only point I'm going to speak to. The issue of control was, in fact, litigated by the Supreme Court, Your Honor. There were extensive affidavits. The wording of the Supreme Court in their decision really parrots the evidence that was filed on behalf of one of my clients, an individual from Clark County. In addition to that, Mr. Cosmotta [sic], a long-time employee, a key, critical employee of the Supply System filed a very extensive affidavit contesting all of that issue. So it, in fact, I think the Court needs to take some time and think about the control question because in fact that was litigated. Now, not necessarily—

"THE COURT: You mean it was litigated by affidavit, and the Supreme Court decided a contested issue on an affidavit?

"MR. MALANCA: Yes.

"THE COURT: I never heard that before.

"MR. MALANCA: Well, that was what was done, Your Honor, and it was done on the basis that a decision had been made on a summary judgment based on affidavits on the matter.

"THE COURT: Did Judge Coleman [the trial judge] ever rule on the contested issue of control based on this affidavit? I may have missed something in what I read, but I was not aware that Judge Coleman had conflicting affidavits, made the determination of fact and based a ruling on it.

"MR. MALANCA: No, but the affidavits were in the files, and the Supreme Court in reviewing those affidavits made that ruling."

Attachment B

Deposition Testimony of Robert L. McKinney, General Manager of Cowlitz County Public Utility District and a Member of the Participants' Committee from 1976 to March 1982, Given on January 22, 1985, Tr. 551, 561, 628-35

"Q. Did you believe at any time that the Participants Committee was a rubber stamp for the Supply System's decisions?

"A. No.

". . .

"Q. Did you have a personal view as to the degree of control that the Participants Committee should exercise over the construction of the projects?

"A. Yes.

"Q. What was your view, sir?

"A. I viewed that it should be similar to my experience with the Mid-Columbia projects that we were involved with over the years, which as a matter of contract have what we call a purchaser's advisor committee. And in summary, in those cases which preceded this, in my experience, the entity sponsor or owner of the plant had to be in management and policy control of their own project, and that the advisor committees, we called them — purchasers advisor committee, the function was very similar to what I thought was proper and very close to what I believed was a proper role of the Participants Committee with regard to Plants 4 and 5.

"Q. Did that advisor committee have the powers that are reflected in the participants agreement as ultimately signed by the participants in Projects 4 and 5?

"A. Yes, they are very similar.

". . .

"Q. In general, Mr. McKinney, do you believe that you kept the participants that designated you as their representative informed of matters that were considered by the Participants Committee?

"A. I do.

". . .

"Q. Did your perception of the Participants Committee's role change during the period of time that you were a Participant Committee member?

"A. Yes.

"Q. Would you describe to me how it changed?

"A. When I undertook to accept this additional assignment I had contemplated that our function as being a conduit between participants and the Supply System, in the sense as a purchaser's-advisor-type committee, would require meetings approximately once a quarter, maybe slightly more often. But as these problems began to increase, they seemed to require many more meetings and I eventually in March of 1982 found that it was taking far too much time for me to try to cover just because of the number of meetings. And therefore, I resigned from the Participants Committee.

". . .

"Q. What was the reason for the increasing workload and frequency of meetings of the Participants Committee?

"A. A number of things.

". . .

"Q. How about schedule delays?

"A. Which resulted in increases in budgets. All these things resulted in increases in budgets.

"Q. And these are the things that required a very much greater workload on the part of the Participants Committee?

"A. It became — yes, it became very — the need, or the apparent need by some to consider the balanced financing program, took a lot of time.

". . .

"Q. It took a lot of time with the Participant Committee?

"A. It took a lot of time, yes.

". . .

"Q. Did the increasing budgets of the Supply System, construction budgets, require more time and consideration by the Participants Committee?

"A. Oh, yes.

"Q. And did the fact that there were schedule delays and contract change orders require more consideration by the Participants Committee?

". . .

"A. Since the primary function of the participants Committee was to serve as a conduit for information, any change of the type that we are talking about did increase the amount of information to be communicated.

". . .

"Q. You mean to the participants?

"A. To the participants and to all the public agencies of the Pacific Northwest.

"Q. Wasn't another primary function of the Participants Committee to consider every change order in the construction of Plants 4 and 5 that exceeded $2 million?

"A. Change orders over a limit.

"Q. $2 million. Didn't the Participants Committee have to consider any award of any contract or approval of any change order in excess of $2 million?

"A. That's my recollection.

"Q. And as the construction process got bigger and bigger didn't that require more time of the Participants Committee to consider those?

". . .

"A. Yes

". . .

"Q. Mr. McKinney, my only question was whether the Participants' Committee spent considerable time on the approval of the fuel plan.

"A. And my answer, of course, was yes.

". . .

"Q. What about the proposed bond resolutions? As need for the Supply System to go to the bond market ever more frequently occurred, the Participants Committee had to spend more time on considering the bond resolutions to sell those bonds, didn't it?

"A. Yes."